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The State University, Due Process and Summary Exclusions

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THE STATE UNIVERSITY, DUE PROCESS AND SUMMARY EXCLUSIONS

Both federal and state courts have held that under the due process clause of the Fourteenth Amendment, public colleges and universities must normally afford students both notice and an opportunity for a hearing before taking such severe disciplinary action against them as expulsion or long-term suspension.[1] At the same time, both the courts and commentators have recognized that a public university can constitutionally suspend or exclude a student from a campus without notice and a hearing under exigent circumstances.[2] In California, Penal Code section 626.4 authorizes state college and university officials to exclude persons from a campus without notice and a hearing for periods not to exceed fourteen days "whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of such campus or facility." Any person who willfully and knowingly enters or remains upon the campus or facility in violation of the withdrawal of consent is guilty of a misdemeanor.[3]

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1. See notes 8-21 & accompanying text *infra*. The due process standards are different as applied to private universities, since private universities usually lack the element of "state action" required by the due process clause.

2. See notes 34-40 & accompanying text *infra*. The Supreme Court has recently granted certiorari in a case involving the summary suspension of high school students. Williams v. Lopez, *cert. granted*, 42 U.S.L.W. 3458 (U.S. Feb. 19, 1974) (No. 73-898). The case may well be influential in the area of due process as applied to public schools but its future applicability to colleges and universities is highly questionable. At least one court, in upholding the validity of the suspension of a high school student was careful to distinguish cases involving college and university students. The court stated: "There are significant factual distinctions between . . . a college suspension and a public school suspension. For example, in a college or university, teachers and students are rarely in class for more than a few hours a day, whereas in the public school system teachers and students are in class throughout the day. While public school teachers and administrators would be called upon to miss class if a prior hearing is held, the same is not usually true in colleges and universities. The disruption of the educational process that occurs as a result of a prior hearing therefore is less likely to occur in the college than it is in the public school.

"Additionally, the consequences of a public school suspension are considerably less serious than those which follow from a university suspension. . . . [S]uspension or expulsion from a college or university may seriously affect a student's opportunity to obtain a graduate or postgraduate degree, or otherwise achieve professional status." Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 292-93 (S.D. Fla. 1970), *vacated*, 401 U.S. 988, *aff'd*, 450 F.2d 1103 (5th Cir. 1971).

3. CAL. PEN. CODE § 626.4 (West Supp. 1974). The statute states that college officials "may notify a person that consent to remain on the campus . . . has been

Penal Code section 626.4 was part of a wave of legislation enacted by several states in the late 1960's to aid college officials in dealing with campus disruptions.[4] This note will examine two major effects this legislation has had on procedural due process in the context of campus activities. First, it has both increased and changed the nature of the liabilities imposed upon students for the breaking of campus regulations. For example, Penal Code section 626.4 imposes criminal liability by making it a misdemeanor to violate willfully a valid exclusion order. A concomitant of the increased liabilities imposed for misconduct is the requirement that students be afforded greater procedural protection before any punishment may be imposed, thereby making it more difficult for college officials to justify summary action against students.

Second, and more significant, legislation such as Penal Code section 626.4 represents a judgment by the legislature that universities are no longer to be considered "special enclaves" separate from the larger society, but rather, members of university communities, particularly students, are to be held accountable for misconduct in the same manner as other members of society. This judgment is contrary to the currently prevailing judicial view that colleges and universities are to be considered "unique" and that constitutional rights are to be applied to them in light of "the special characteristics of the school environment."[5] Thus, two branches of the state, the judiciary and the legislature, are currently acting on the basis of contrary philosophies. This note will propose that if legislation such as Penal Code section 626.4 is to be upheld, the courts' treatment of colleges and universities as unique institutions must be revised.

In the context of the changes brought about by the rise of legislation aimed at campus disruptions, this note will also examine the narrower issue of summary exclusion. Penal Code section 626.4 was constitutionally challenged in *Braxton v. Municipal Court*,[6] a case which arose out of student unrest at San Francisco State College in the fall of 1970. Petitioners had allegedly demonstrated against the

withdrawn . . ." but nowhere does the statute expressly require that the student be given notice in the due process sense of being told the specific charges and grounds upon which the exclusion is based.

The statute expressly states that consent to remain on campus shall not be "withdrawn for longer than 14 days from the date upon which consent was initially withdrawn." A student though, may submit a written request for a hearing, and if the student does so then the college "shall grant such a hearing not later than seven days from the date of recipt of such request . . . ."

4. See notes 53-58 & accompanying text *infra*.

5. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969) (First Amendment rights). See notes 49-51 & accompanying text *infra*.

6. 10 Cal. 3d 138, 514 P.2d 697, 109 Cal. Rptr. 897 (1973).

publication of articles appearing in the campus newspaper, and were subsequently informed by college officials that consent for them to remain on campus had been withdrawn. They were later charged with violation of section 626.4 for willfully entering and remaining on campus after receiving notice of the withdrawal of consent. Petitioners argued that the statute was an unconstitutional violation of procedural due process, but the court found the statute to be constitutional and held that a prior hearing could be dispensed with "when necessary to prevent significant injury to persons or property during an emergency occasioned by a campus disorder."[7] In essence, the court measured the constitutionality of summary action by an emergency standard.

Braxton v. Municipal Court stands for the proposition that the procedural due process requirements of notice and a hearing are not absolute as applied to students. Rather, they must give way to the interests of the public university to act summarily when threatened with an emergency. This note will examine the justification for summary action, and in particular will discuss what constitutes a valid emergency. It is submitted that notice and a hearing can be constitutionally eliminated only when two elements are present: (1) conduct which poses a substantial threat to the functioning of the university, and (2) circumstances which have made the holding of disciplinary hearings either impossible or highly impractical.

The Historical Perspective

Before the 1960's it was unclear whether the courts ever required public colleges to give students notice and a hearing before taking disciplinary action against them. Some courts implied that notice and a hearing were required,[8] while others implied they were not.[9] Still other courts, while upholding the sufficiency of the disciplinary hearings in the particular cases before them failed to reach the precise

7. *Id.* at 154, 514 P.2d at 707, 109 Cal. Rptr. at 907. The statute was also attacked on the grounds that it was vague and overbroad. To meet these challenges the court interpreted it to authorize summary exclusion only upon reasonable cause to believe that the person excluded had (1) incited to violence or engaged in conduct causing a substantial and material disruption of an educational institution incompatible with the peaceful functioning of the campus, and (2) had committed unlawful acts proscribed by other statutes. *Id.* at 150 & 152, 514 P.2d at 705, 109 Cal. Rptr. at 905. Finally, to sustain a conviction under the statute the prosecution must prove "(1) that the person excluded did cause a disruption, as herein defined, by illegal acts, and (2) that he violated the exclusion order." Id. at 154-55, 514 P.2d at 707, 109 Cal. Rptr. at 907.

8. Commonwealth *ex* rel. Hill v. McCauley, 3 Pa. County Ct. 77 (1887); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942).

9. *E.g.*, Vermillion v. State *ex rel.* Englehardt, 78 Neb. 107, 110 N.W. 736 (1907).

issue of whether such hearings were actually a constitutional requirement.[10]

This issue was finally settled in *Dixon v. Alabama State Board of Education.*[11] In 1960 a group of black students at Alabama State College took part in civil rights demonstrations in Montgomery, Alabama. A few days later, the Alabama State Board of Education summarily acted to expel the students. The students brought suit in the United States District Court alleging that their expulsion without notice and an opportunity for a hearing violated their constitutional rights under the due process clause of the Fourteenth Amendment. The District Court dismissed the complaint, and the students appealed to the Fifth Circuit Court of Appeals. There the court was squarely presented with the issue of "whether due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct."[12] In a landmark decision, the Fifth Circuit held that notice and opportunity for a hearing were constitutional requirements.

In so holding, the court was careful not to imply that it was requiring a full-dress judicial hearing with all of the safeguards afforded in criminal proceedings,[13] nor did it attempt to formulate a precise list of requirements for every disciplinary hearing. Instead, it chose to expound general requirements, and stated that the "minimum procedural requirements" in each case would "depend upon the circumstances and the interests of the parties involved."[14]

The court did lay down guidelines for the case before it, however, stating that "[t]he notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion . . . ."[15] At the hearing, either before the Board of Education or an administrative official of the college, the student was to be allowed to present his own defense and to produce oral testimony or written affidavits of witnesses. If the hearing was not before the Board of Education directly, "the results and findings of the hearing [were to] be presented in a report open to the student's inspection."[16]

Dixon, in its narrowest sense, merely required notice and a hearing in the case of an expulsion. The question remained whether no-

10. For general discussions and summaries of these early cases see Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157-58 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961); Annot., 58 A.L.R.2d 903 (1958).

11. 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

12. *Id.* at 151.

13. *Id.* at 159.

14. *Id.* at 155.

15. *Id.* at 158.

16. *Id.* at 159.

tice and an opportunity for a hearing would also be required with lesser punishments, such as suspensions. Moreover, it still had to be decided whether the requirements of particular hearings, such as the right to produce witnesses, would vary with the seriousness of the potential punishment, and if so, in what way.

The cases following *Dixon* grappled with these and similar issues. Step by step the courts extended the requirements of notice and a hearing to incidents involving less serious punishments. For example, in *Knight v. State Board of Education*[17] students were indefinitely suspended under a school regulation requiring suspension or dismissal of any student convicted of a criminal offense involving personal misconduct. The students had been arrested and convicted of disorderly conduct during a civil rights demonstration. Finding that the students' conviction alone was not clearly indicative of personal misconduct as required by the school regulation, the court held that the students could not be indefinitely suspended without notice and a hearing.[18] In *Scoggin v. Lincoln University*[19] students were suspended for the remainder of the school term after having allegedly participated in a disturbance in the school cafeteria at which university property was damaged. The court primarily dealt with the sufficiency of the notice and hearing the students had been given, and in so doing clearly required notice and an opportunity for a hearing before such a long-term suspension could be imposed. In still other cases, courts have required a hearing prior to suspensions for periods as short as ten to thirteen days.[20] The end result of these and similar cases has been to require an opportunity for a hearing before any suspension for a "substantial period of time."[21]

In delineating the particular procedures to be followed in individual disciplinary proceedings, courts have refused to require all of the safeguards contained in full-dress judicial hearings. For example, there is generally no right to counsel,[22] or to confront or cross-examine witnesses.[23] However, if the punishment is particularly severe, or if

17. 200 F. Supp. 174 (M.D. Tenn. 1961).

18. *Id.* at 180.

19. 291 F. Supp. 161 (W.D. Mo. 1968).

20. Black Students *ex rel.* Shoemaker v. Williams, 470 F.2d 957 (5th Cir.), *aff'g mem.*, 335 F. Supp. 820 (M.D. Fla. 1972) (case involved high-school students and thus is of questionable authority for colleges and universities); Stricklin v. Regents of the Univ. of Wis., 297 F. Supp. 416 (W.D. Wis. 1969), *appeal dismissed*, 420 F.2d 1257 (7th Cir. 1970).

21. Black Students *ex rel.* Shoemaker v. Williams, 470 F.2d 957 (5th Cir. 1972) (high school suspension); *See* Wright, *The Constitution on the Campus*, 22 VAND. L REV. 1027, 1071 (1969).

22. *E.g.*, Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustees, 9 Cal. App. 3d 873, 879-80, 88 Cal. Rptr. 563, 567 (1970).

23. General Order on Judicial Standards of Procedure and Substance in Review

other circumstances warrant, these or similar requirements may be imposed.[24] For example, in *Esteban v. Central Missouri State College*,[25] the court required that students who had been suspended following two nights of campus demonstrations be afforded a hearing at which they would be permitted to have counsel present to advise them.[26]

Generally, the cases have required that each disciplinary proceeding contain at least four basic safeguards.[27] First, the student must be given timely notice of the charges against him. In *Dixon*, for example, such notice was to contain a statement of the specific charges that would justify expulsion.[28] Second, the student must be notified regarding the nature of the evidence against him.[29] Third, he must be able to present his own defense, which may, under some circumstances, include the presentation of witnesses, affidavits, and exhibits on his behalf.[30] Finally, the student must be punished only on the basis of substantial evidence.[31]

As already indicated, these requirements generally apply only in cases involving expulsions and suspensions for a "substantial period of time." Where the punishment is less severe, the requirement of notice and a hearing are relaxed. Informal procedures amounting to

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of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147-48 (W.D. Mo. 1968).

24. *Id.* at 147-48.

25. 277 F. Supp. 649 (W.D. Mo. 1967), *cert. denied*, 398 U.S. 965 (1970).

26. *Id.* at 651.

27. Gardenhire v. Chalmers, 326 F. Supp. 1200, 1204 (D. Kan. 1971), *quoting* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1071-72 (1969). *See* Wright v. Texas Southern Univ., 392 F.2d 728 (5th Cir. 1968); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Scoggin v. Lincoln Univ., 291 F. Supp. 161 (W.D. Mo. 1968); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147 (W.D. Mo. 1968).

The case which probably required the least formal proceedings when a serious punishment was involved was Due v. Florida A & M Univ., 233 F. Supp. 396 (N.D. Fla. 1963). The two plaintiffs were indefinitely suspended after being convicted of contempt in a state court. They were telephoned and asked to contact a disciplinary committee. They presented themselves to the committee the same day and were read a letter which they denied receiving, advising them of the charges against them. They were then allowed to answer the charges until they no longer had anything to say. Apparently at least one plaintiff was rather tongue-tied by the suddenness of the proceedings, as the respective hearings lasted only fifteen and forty-five minutes. It is highly questionable whether such proceedings afforded either adequate notice or an opportunity to prepare or present an adequate defense, but in spite of this the court held there was no violation of due process.

28. 294 F.2d 150, 158 (5th Cir. 1961) (dictum).

29. *Id.*

30. *E.g.*, id. at 159; Esteban v. Central Missouri State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967).

31. *Id.*

little more than a discussion between the disciplined student and college officials have been upheld as adequate by the courts. For example, in *Perlman v. Shasta Joint Junior College District Board of Trustees*[32] a dean had instructed a student to follow prescribed procedures in inviting a group of socialists to speak at the campus. When the student failed to follow the procedures, the dean told him to report to the president's office an hour later. The student did so and met with the president, the dean, and other officials. After the meeting the student was suspended for three days and placed on disciplinary probation. The court held that the hearing did not violate due process, indicating that when minor punishments are involved, the courts will not interfere as long as the hearing is fair.[33]

Summary Exclusion/Exigent Circumstances

As the courts extended the requirements of notice and a hearing to punishments less onerous than expulsions, the question remained whether, and under what circumstances, purely summary action would still be permissible. Although litigation on the issue was infrequent, courts often recognized that exigent circumstances could justify summary action. In *Stricklin v. Regents of the University of Wisconsin*,[34] for example, the court indicated that in situations threatening harm to the physical and emotional well-being of the disciplined student or others, or damage to university property, summary action would be justified where it was "impossible or unreasonably difficult" to provide a hearing prior to a temporary suspension.[35] In *Gardenhire v. Chalmers*[36] the court stated that the university could suspend a gun-carrying student on its campus without notice and a hearing on a temporary basis for a reasonable time; the court indicated that five to fifteen days would be a reasonable time.[37] Similarly, in *Scoggin v. Lincoln University*[38] the court stated that the university could remove students from the campus without notice and a hearing when their conduct threatened to reduce the campus to a state of chaos.[39] Both university and student groups have accepted the validity of summary action un-

32. 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970).

33. *Id.* at 879, 88 Cal. Rptr. at 567. In addition, courts draw a distinction between dismissals based upon misconduct and dismissals for academic reasons, and generally do not apply procedural due process requirements to purely academic decisions. *See* Wright v. Texas S. Univ., 392 F.2d 728, 729 (5th Cir. 1968); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1069 (1969).

34. 297 F. Supp. 416 (W.D. Wis. 1969).

35. *Id.* at 420.

36. 326 F. Supp. 1200 (D. Kan. 1971).

37. *Id.* at 1204-05.

38. 291 F. Supp. 161 (W.D. Mo. 1968).

39. *Id.* at 172.

der the circumstances outlined in *Stricklin*.[40]

In summary, the procedural due process requirements in campus disciplinary proceedings can analytically be divided into three levels. First, when serious penalties are imposed, notice and a hearing containing basic procedural safeguards are to be afforded. Second, where less severe or temporary punishments are involved, informal proceedings are permissible as long as they are fundamentally fair. Third, in certain exigent circumstances the possibility of summary action is recognized.

The Rationale of Due Process

This wide divergence in the scope of the procedures required results from the test the courts use in applying procedural due process rights to students on college campuses. As stated by the court in *Dixon*, the requirements of due process in each case "depend upon the circumstances and the interests of the parties involved."[41] In other words, the courts must look at the specific interests of both the university and the student involved in each case. To determine if a particular procedure is fundamentally fair, and therefore valid, the court must balance the school's interest in maintaining the procedure against the gravity of the harm caused the student by the imposition of the punishment involved. The gravity of the harm will in turn help determine the extent of the procedural protection to be given the student; the greater the potential harm the greater the protection required.

A classic statement of the application of this balancing test was given by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*[42] from which the *Dixon* court quoted:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.[43]

Under this test there is no precise standard, no set list of requirements

40. *Joint Statement on Rights and Freedoms of Students*, 53 AM. ASS'N UNIV. PROFESSORS BULL. 365, 368 (1967). *See* Dunkel v. Elkins, 325 F. Supp. 1235 (D. Md. 1971), where a Maryland statute, distinguishable from Penal Code section 626.4 in that it allowed for summary exclusion of only non-students or non-university personnel, was considered valid if applied in an emergency situation where a hearing would be impractical.

41. 294 F.2d 150, 155 (5th Cir. 1961).

42. 341 U.S. 123 (1951) (Frankfurter, J., concurring).

43. *Id.* at 163, *quoted in* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 155 (5th Cir. 1961).

to which a court may look in deciding a school disciplinary case. Rather, it is only by examining the facts of each particular case that a court can determine what disciplinary procedures are to be required. This test is highly flexible, and each case presents a new and different problem.

The Interests Involved

The crucial factors determining the procedural rights of college students are thus the conflicting interests of colleges and students that are affected when the courts require formal disciplinary procedures.[44] The primary interest of the student that needs protection from arbitrary and unwarranted action by the university is his education. An individual's life-time income can be greatly affected by his level of education.[45] Moreover, the educational process itself is expensive, and any disruption of it may entail increased financial burdens by increasing the duration of the educational process.

Further, to punish a student for alleged misconduct is to label him as irresponsible and a troublemaker. This can damage his status and sense of self-worth, as well as limit him in his choice of future pursuits.

The same consequences arise if the punishment imposed denies a student an education or disrupts it, because in the eyes of society a person's level of education is often seen as an indication of his achievements and abilities. Finally, an education in and of itself may be an important part of a full life by allowing for deeper and more satisfying involvement in countless activities and pastimes, including art, literature, and music. All of these factors weigh heavily on the student's side in the balancing process, and call for the courts to afford students formal procedural protections in disciplinary cases.[46]

On the other side of the scale are the interests of the university. Every university has a basic need to exercise disciplinary authority in order to maintain a functioning institution. The more complex and intricate the procedures that the courts require, the more time, energy,

44. For general discussions of the interests involved, which parallel much of the following text, see Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 573-77 (1971); O'Toole, *Summary Suspension of Students Pending a Disciplinary Hearing: How Much Process is Due?* 1 J. LAW & EDUC. 383, 399-409 (1972).

45. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 575 (1971), *citing* BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 108 (1969).

46. Moreover, society has an interest in the education of its members since an education may be important in order "to fulfill as completely as possible the duties and responsibilities of good citizens." Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

and money that will be drained away from other university activities. Moreover, the functions of discipline and punishment are often seen by educators as inseparable from the functions of guidance and counseling.[47] The decision as to when to discipline a student, and in what manner, may thus entail intricate considerations and judgments about the individual involved. In order to make discipline effectively serve the functions of guidance and counseling, educators feel that the procedures involved must be informal and flexible.[48] Only then can the proceedings be tailored to fit the individual.

These ideas are closely intertwined with the university's own self-image. It often thinks of itself as an enclave separate from the larger society, a special community bound together by its scholarly activities, where disputes are to be settled by reasoned discussion and common understanding. In this "community of scholars" both mundane administration and broader academic pursuits are bound together by the notion that everything is part of the learning process. To force adversary proceedings upon such a community is to threaten this delicate balance and to upset the unique educational atmosphere.

Indeed, both the courts and the commentators share this view of the university as a special enclave. They argue that in applying constitutional rights to colleges and universities, courts should not be guided by analogies to criminal or administrative law;[49] instead, constitutional rights should be applied to educational institutions only "in light of the special characteristics of the school environment."[50] To require educational institutions "to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of the educational institutions, nor the ultimate advantages that society derives therefrom."[51]

The university's interests in flexible informal procedures can be divided into two types. The fact that formal disciplinary proceedings can drain off vital time, energy, and money is an objective considera-

47. *See, e.g.*, Monypenny, *University Purpose, Discipline, and Due Process*, 43 N.D.L. REV. 739, 748 (1967).

48. *See, e.g., id.*

49. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1082 (1969); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 142 (W.D. Mo. 1968).

50. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969). *Tinker* itself involved First Amendment rather than due process rights, but the courts express a similar attitude in the area of due process when they speak of the inappropriateness of drawing analogies to criminal or administrative law.

51. Goldberg v. Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 880, 57 Cal. Rptr. 463, 472 (1967).

tion, an indisputable fact of any large institutional organization whose resources are limited. On the other hand, other considerations are not similarly objective. For example, the widespread beliefs that discipline and guidance are inseparable, that the university requires flexibility and informality in order both to carryout these functions and to foster cooperation and community, and that these factors are in turn vital to the educational process—these are not requirements inherent in the institution. Rather, they are important because they are components of a deeply ingrained educational philosophy which says they are important. The tendency of the courts to speak of the university as "unique" is partly a statement of that philosophy. Thus, when courts balance the university's interests it is not merely the institution that is being protected, but also the underlying philosophy itself.

The Effects of Campus Legislation

Both the interests of the university and the student have been significantly affected in recent years by the rise of legislation designed to deal with campus disruptions, of which Penal Code section 626.4 is a part.[52] California, for example, has enacted legislation which allows state colleges and universities to withdraw state financial aid from students who, after a hearing, have been "found to have willfully and knowingly disrupted the orderly operation of the campus . . . ."[53] Another statute recognizes the university's inherent power to refuse financial aid because of misconduct which in the college's judgment "bears adversely on [a student's] fitness for such assistance."[54] A penal statute imposes criminal liability for the bringing or possession of a firearm on a college campus without permission.[55] Another imposes criminal liability for entering a university after having been suspended or dismissed following a hearing and having been denied access to the college as a condition of the suspension or dismissal.[56] A recent Florida statute authorizes its state university to take into account any past misconduct by a student when considering admission.[57] Presumably this would apply to graduate as well as undergraduate programs. Penal Code section 626.4 itself imposes criminal liability for what is essentially the breaking of a college regulation,

52. For an overview of the various types of legislation enacted see Note, *State Legislative Response to Campus Disorder: An Analytical Compendium,* 10 HOUSTON L. REV. 930 (1973).

53. CAL. EDUC. CODE § 31291 (West Supp. 1974). However, the financial aid may only be withdrawn for the ensuing two academic years.

54. CAL. EDUC. CODE § 31293 (West Supp. 1974).

55. CAL. PEN. CODE § 626.9 (West Supp. 1974).

56. CAL. PEN. CODE § 626.2 (West Supp. 1974).

57. FLA. STAT. ANN. § 240.052 (West Supp. 1974).

disobeying a valid exclusion order.[58]

The primary effect of this legislation on campus procedural due process is both to change and to increase the liabilities imposed upon students for misconduct. The withdrawal of financial aid for many students is tantamount to expulsion, since without it they will be unable to continue in school. The denial of admission to a state university because of past misconduct is the same as closing the door to undergraduate or graduate education for students who are only able to attend state universities. The imposition of criminal liability for misconduct threatens a student with the possibility of fine or imprisonment. In addition, it could result in a student having a police record which could diminish his future employment prospects as well as damage his status and sense of self-worth.

Each of these possibilities should weigh heavily on the student's side when the courts consider the validity of disciplinary proceedings. Recognizing this, some of the preceding statutes specifically require hearings before sanctions are imposed against students.[59] In addition, the *Braxton* court read an additional safeguard into Penal Code section 626.4 by stating that before a student could be convicted of violating an exclusion order, it had to be shown that the student had originally committed unlawful acts that would have justified the university in excluding him from the campus.[60]

These safeguards, however, do not lessen the importance of affording a student procedural protections at each stage of proceedings that could lead to more serious sanctions. For example, if a student is punished for misconduct without notice and a hearing, and it is later determined that his financial aid should be withdrawn, it is a poor substitute to offer him a hearing only at that stage of the proceedings. If he had been given a hearing at the time of the original misconduct it might have been determined that he was guilty of no wrong; then the issue of financial aid might never have arisen. In the meantime, the student has the threat of losing his financial aid hanging over his head. As another example, if a student is excluded from a campus without a hearing under Penal Code section 626.4 and it later turns out the exclusion was not justified, the student cannot be convicted of a misdemeanor for violating the order. However, the student may still be excluded from the campus for as long as fourteen days, and if he chooses not to risk criminal liability by violating the order, the exclusion is an effective sanction against him. He cannot reenter the

58. For additional California criminal statutes concerning colleges and universities see CAL. PEN. CODE §§ 626.6, 626.8 (West Supp. 1974).

59. *E.g.*, CAL. EDUC. CODE § 31291 (West Supp. 1974).

60. 10 Cal 3d at 154-55, 514 P.2d at 707, 109 Cal. Rptr. at 907.

campus during the period of the exclusion except under the threat of criminal liability.[61]

By passing such legislation the state thus creates a paradox which the legislature apparently neither intended nor foresaw.[62] The statutes are primarily designed to ensure the effective functioning of colleges and universities by helping college officials deal with disciplinary problems. At the same time, by increasing the liabilities that may be imposed for misconduct, the statutes increase the interests of the students which must be protected from arbitrary and unwarranted actions by the university. This requires more formal and thorough disciplinary procedures at each stage of disciplinary proceedings that might lead to serious sanctions. However, such procedures can be expensive and are contrary to the ideals of informality and flexibility thought necessary by many for an effective college education. Thus, while the legislation on the one hand may help universities to carry out their educational functions, on the other hand it may hinder them. In light of this, it may well be that the legislation was ill-advised.

In addition to increasing the liabilities imposed for misconduct, and thereby necessitating that students be given greater procedural protection, the legislation has a second major impact on campus procedural due process requirements—an impact equally unintended and unforseen by the legislature.[63] As noted earlier, the university's need for flexibility and informality, and the sense of its uniqueness and separateness from the rest of society, are part of an underlying educational philosophy. It is this philosophy which is being protected when the courts balance the interests of the university against those of the student, especially when the courts indicate that the balance must be struck in light of the unique characteristics of the school environment.[64]

Penal Code section 626.4, and the legislation of which it is a part, are manifestations of a contrary philosophy. In essence, the legislature is saying that college communities are no longer to be treated as special enclaves, but rather that their members, particularly students, are to be held accountable for their actions in the same manner as is the rest of society. It may well be valid to say that students should not be permitted to escape criminal liability for actions that are usually

61. The only exception under the statute is that a student may enter the campus "for the sole purpose of applying . . . for the reinstatement of consent or for the sole purpose of attending a hearing on the withdrawal." CAL. PEN. CODE § 626.4 (West Supp. 1974).

62. *See* REPORT OF THE SELECT COMMITTEE ON CAMPUS DISTURBANCE, JOURNAL OF THE ASSEMBLY, Regular Session (Supp. App. 1969) (legislative intent of statutes aimed at campus disruptions).

63. *Id.*

64. See text accompanying notes 49-51 *supra.*

criminal; however, with that argument must go the corresponding proposition that universities must lose part of their uniqueness, and that the carefully constructed shield between the university and the rest of society must consequently be pierced.

The state then, is left expounding contrary philosophies. One arm of the state, its judiciary, contends that the uniqueness of the university is an important interest to be protected when considering the application of procedural due process requirements to college campuses. On the other hand, the legislature says that the university is to be brought into conformity with the standards governing the larger society and that its uniqueness cannot serve as a bar to such conformity.

The Rationale of Summary Exclusion

The most distinguishing feature of summary exclusion is that it dispenses with all the usual procedural requirements of due process. In addition, it generally applies where the punishment, though severe, is short-lived. Penal Code section 626.4 concerns temporary exclusions not to exceed fourteen days,[65] and cases dealing with summary procedures usually involve similar short-term or temporary suspensions.[66]

There are two different approaches to the problem of how to justify summary action by universities. The first may be termed a "no substantial harm" rationale.[67] As previously noted, the requirements of notice and hearing were first applied to expulsions, and were later extended on a case-by-case basis to lesser punishments until they were required for any suspension for a substantial period of time.[68] But if the areas of summary action are restricted to temporary suspensions, arguably the punishment is not so severe as to qualify for procedural protection.

The primary focus of the "no substantial harm" approach is upon the student's interest. The validity of a university's summary action is mainly determined by looking at the severity of the sanction imposed upon the student. The student's conduct need not involve a direct primary threat to the university. Rather, the university's protection is involved only indirectly by being able to maintain a functioning sys-

65. The section reads in part: "In no case shall consent be withdrawn for longer than 14 days . . . . The person from whom consent has been withdrawn may submit a written request for a hearing on the withdrawal within the two-week period . . . . The chief administrative officer shall grant such a hearing not later than seven days from the date of receipt of such request . . . ."

66. *E.g.*, Stricklin v. Regents of the Univ. of Wis., 297 F. Supp. 416 (W.D. Wis. 1969); *see, e.g.*, Gardenhire v. Chalmers, 326 F. Supp. 1200, 1204-05 (D. Kan. 1971).

67. The term is the author's own.

68. See notes 8-21 & accompanying text *supra*.

tem for day to day disciplinary problems. Under this analysis, the primary purpose of the discipline can be viewed as punishment, with the punishment designed to encourage adherence to the university's regulations and perhaps to educate the student to his responsibilities.[69]

The second approach, that adopted by the court in *Braxton,* is an "emergency" standard. The primary focus of this analysis is not upon the interest of the student, but upon that of the university. An "emergency" implies a crisis threatening the very functioning or existence of the university itself. Thus, the validity of a university acting summarily will be primarily determined by looking at the extent to which a student's conduct poses a threat to the university's day-to-day functioning. The university's interest in summary action is not simply to discipline its students, but also to protect its institutions. Thus, the sanction of a temporary suspension or exclusion may not be designed as a form of punishment, but rather as a self-protective measure. In short, in the "no substantial harm" rationale the focus is primarily upon the severity of the punishment; in the "emergency" approach the focus is upon the conduct of the student.

Guidelines for Summary Exclusion

The question remains: How should courts strike the balance of procedural due process in future litigation involving summary exclusions? First, the "no substantial harm" rationale should be discarded. From the very fact that summary exclusions involve "exclusions" it

69. In Banks v. Board of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970), *vacated,* 401 U.S. 988 (1971), *aff'd,* 450 F.2d 1103 (5th Cir. 1971), the court essentially followed this approach in a case involving a high school student who was suspended for 10 days without notice or a hearing for allegedly failing to stand during a flag salute ceremony. The suspension was authorized under a regulation of the Board of Public Instruction. Plaintiff attacked the regulation as an unconstitutional violation of procedural due process, but the court disagreed. It reasoned that the basic question was whether the procedure was necessary to "alleviate interference with the educational process," and recognized that summary action was permissable during a riot or other emergency. *Id.* at 291. It then extended this argument by saying a hearing, prior to the suspension, itself produces a disruptive effect upon the educational process which could not be permitted. *Id.* at 291-92. Essentially then, the court was protecting the school's ability to maintain a functioning system for everyday disciplinary problems, and considered a 10 day suspension as too minor a punishment to override that interest. The court was careful to point out, however, that it was dealing with public school rather than college students, and that with the latter the consequences of a suspension would be more serious. *Id.* at 292-93.

A year later, in Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971), another court was presented with a similar attack on another part of the regulation which authorized the school board to impose an additional 30 day summary suspension on top of the 10 day suspension. While recognizing that the 10 day summary suspension had been upheld, the court felt the additional 30 days was a penalty of too great a magnitude to be imposed without notice and a hearing. *Id.* at 301-02. Thus, the severity of the punishment had shifted the balance to the side of the student.

can readily be argued that the punishment is never really insignificant. Moreover, even the most short-lived of exclusions is generally imposed because of serious misconduct. The exclusion in the eyes of society is a confirmation of the student's involvement in the misconduct and labels him as "irresponsible" and "troublesome."[70] But most of all, the rise of campus legislation has significantly altered the balance of interests. The summary exclusion can now be the first step in the imposition of criminal liability. "Misconduct" has been recognized as a factor in the dispensing of financial assistance, increasingly scarce in recent years, as well as a criterion in determining eligibility for admission. Furthermore the standard itself is unduly uneven as applied. The same punishment can lead to vastly dissimilar consequences depending upon the student involved, his financial condition, his year in school, his future educational and career goals, and his own self-image. For example, while a summary exclusion might have little effect on a wealthy student who plans to take over the family business, it might have dire consequences for a poor student, dependent upon financial aid, who is struggling to get into a state graduate school.

The emergency rationale, as an alternative, provides a more precise and workable standard which recognizes the true issues involved in summary exclusion. Penal Code section 626.4 was adopted not as a simple component of any general scheme of campus regulations, nor as an aid to the quick handling of day-to-day disciplinary problems. Rather, its passage was a direct response to violent disturbances which had closed educational institutions, and which were threatening their continued existence.[71] It was a statute aimed at dealing with just such emergencies.[72] In essence, it was a self-protective measure for state colleges and universities.

The emergency rationale recognizes this self-protection function and focuses on violent disruptions. By requiring an emergency to justify summary exclusion, it requires no more than that for which the statute was enacted. Viewed in this light, the first component of the emergency standard is the requirement that a student's conduct pose a substantial threat to the functioning of the university.[73]

70. The Supreme Court has become increasingly protective of a person's reputation, as exemplified by the following quote: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential . . . ." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

71. *See* REPORT OF THE SELECT COMMITTEE ON CAMPUS DISTURBANCE, JOURNAL OF THE ASSEMBLY, Regular Session (Supp. App. 1969).

72. The court in *Braxton* recognized these purposes of Penal Code section 626.4 and interpreted the statute in light of them. 10 Cal. 3d at 144 & 154, 514 P.2d at 700 & 707, 109 Cal. Rptr. at 900 & 907.

73. The extent to which a student's conduct poses a threat to the functioning of

This threat by itself, however, should not be enough to justify the summary action. A major drawback of *Braxton* was its failure explicitly to go beyond the sole requirement of an emergency threatening significant injury to persons or property.[74] Such an emergency, by itself, may not make impossible the holding of hearings. If the university, even in the context of a qualifying emergency, is capable of readily providing disciplinary hearings, such hearings should not be brushed aside. A second component of the "emergency" should be recognized: the impossibility or impracticability of holding disciplinary proceedings. Indeed, both the lower court in *Braxton*[75] and other courts have recognized such a requirement.[76]

Another factor favors the use of the "emergency" rather than the "no substantial harm" approach. The basic reason for requiring notice and a hearing in the first place is the importance of protecting a student's education from unwarranted intrusions by the university. In essence, notice and a hearing are required only because a student's education is considered a vital interest worthy of protection. During a campus emergency, however, it is not only the education of the excluded student that is threatened, but also the education of every student at the campus. If the college is closed or disrupted by disturbances, their education may be temporarily stopped or disrupted just as effectively as if they themselves had been excluded. Thus during an emergency, the importance of protecting the education of each and every student may demand that the university be able to act swiftly and summarily against disrupting students. But this factor is only present during an emergency threatening the day-to-day functioning of the institution. The emergency rationale takes this into account; the "no substantial harm" approach does not.

It should also be recognized that the choice involved in summary exclusions is not solely between affording a student a full hearing at which he can present witnesses, affidavits, and exhibits on his

the university will vary depending upon the circumstances in which the conduct takes place. For example, conduct which poses no threat to the functioning of the university during a time when the campus is functioning normally may pose such a threat during a time of campus disruptions.

74. See note 75 *infra*.

75. Braxton v. Municipal Ct., 1 Civ. No. 29607, 4-5 (Ct. App. 1st Dist., Feb. 25, 1972).

76. *E.g.*, Stricklin v. Regents of the Univ. of Wis., 297 F. Supp. 416, 420 (W.D. Wis. 1969). While the court in *Braxton* did not explicitly require that the holding of disciplinary hearings be impractical or impossible for summary action to be allowed, it implied that such impossibility was required when it stated that a hearing must be held "as soon as reasonably possible . . . ." 10 Cal. 3d at 145, 514 P.2d at 700, 109 Cal. Rptr. at 900. Under such a requirement, it is difficult to conceive how summary action would be permissible unless it were not reasonably possible to hold disciplinary hearings.

behalf, or affording him no hearing at all. As previously noted, the requirements of a hearing vary widely from formal procedures to what amount to little more than informal discussions between college officials and disciplined students. Aware of this, at least one court has adopted the concept of the "preliminary hearing."[77] Under this approach, during circumstances threatening injury to persons or property, a university may temporarily suspend a student after affording him only a preliminary hearing.[78] The preliminary hearing need not contain all the elements usually involved in formal hearings after which serious sanctions are imposed, such as the presentation of witnesses. Rather, in a preliminary hearing university officials are merely required (1) to make an evaluation of the reliability of the information they have received; (2) to inquire whether the conduct with which the student is charged is of such a nature and occurred in such circumstances as to warrant an immediate suspension for the protection of persons or property; and (3) to give the student an opportunity to meet with appropriate college officials as soon as possible, to be told the nature of the evidence against him, and to be given an opportunity to make any statement he might wish to make.[79] If such a hearing is provided, the student may be suspended temporarily pending a subsequent full-dress hearing at which a more serious sanction might be imposed.

Under the procedure outlined above, a student may still be temporarily suspended without any hearing if it is impossible or highly impractical for the university to hold even a preliminary hearing.[80] But the corollary of this is that a student may not be summarily suspended simply because it is impossible for the university to hold a formal hearing. For summary action, it must be impossible or highly impractical to afford students not only formal hearings, but informal "preliminary hearings" as well.

Lastly, courts in the past,[81] including the court in *Braxton*, have stated that a university is justified in acting summarily against a student when the student's conduct poses a "threat to persons or property."[82] This raises the question of whether or not such a threat should be considered a distinct requirement for summary action.

Such a requirement is unnecessary if instead it is required that the student's conduct pose a substantial threat to the functioning

77. Stricklin v. Regents of the Univ. of Wis., 297 F. Supp. 416 (W.D. Wis. 1969).

78. *Id.* at 420.

79. Buck v. Carter, 308 F. Supp. 1246, 1248 (W..D Wis. 1970).

80. Stricklin v. Regents of the Univ. of Wis., 297 F. Supp. 416, 420 (W.D. Wis. 1969).

81. *E.g., id.*

82. 10 Cal. 3d at 154, 514 P.2d at 707, 109 Cal. Rptr. at 907.

of the university. The apparent rationale for requiring a threat to persons or property is as a safeguard to ensure that a student will be summarily suspended only in cases of grave or dangerous misconduct. A similar safeguard is afforded by strict application of the requirement that a student's conduct pose a substantial threat to the functioning of the university. If a university is in a state of uproar, making the holding of disciplinary hearings impractical or impossible, any conduct which poses a threat to persons or property will in turn, almost by definition, pose a threat to the functioning of the university. Moreover, by focusing on whether or not conduct poses a threat to the functioning of the university, the validity of a university acting summarily is judged in terms of the very reasons that make summary action necessary. During campus disruptions, the prime interest of the university is to alleviate the causes of the disruptions—to act swiftly against the conduct which threatens its normal functioning. The requirement that a student's conduct pose a substantial threat to the functioning of the university not only ensures that a student will be summarily suspended only for grave misconduct, but that such summary action will be limited only to those situations in which it is truly necessary.[83]

Conclusion

This note has argued that summary exclusions can only be justified when a student's conduct (1) constitutes a substantial threat to the functioning of a college or university, and (2) arises under circumstances which make the holding of either formal or informal hearings impossible or highly impractical. When applying these and other due process standards courts today are faced with a fundamental dilemma. As noted previously, the courts often consider the unique and separate nature of the university as an important interest to be protected when applying due process and other constitutional rights to college campuses. As a part of this philosophy, the courts tend to disregard analogies to criminal or administrative law, and tend not to require that universities recognize and enforce the same standards and penalties that prevail in the larger society. At the same time, state legislatures, by passing legislation aimed at campus disruptions, have expressed a contrary philosophy; specifically, such laws represent a legislative judgment that members of the university community are to

83. The requirement that a students' conduct pose a substantial threat to the functioning of the university is similar to the tests courts use when First Amendment rights are involved. The court in Braxton, for example, in order to meet the challenge that Penal Code section 626.4 was overbroad, interpreted it to authorize summary exclusion only upon reasonable cause to believe that the person excluded had incited to violence or engaged in conduct causing a substantial and material disruption of an educational institution. 10 Cal. 3d at 150, 514 P.2d at 705, 109 Cal. Rptr. at 905.

be held accountable for their actions in the same manner as the rest of society and that the universities are no longer to be treated as special enclaves.[84]

The inevitable consequence of the state maintaining such inconsistent philosophies is inconsistent justice. On the one hand, the university's interest in informal and flexible disciplinary procedures is protected by the judicial philosophy that universities are to be treated as unique and separate from the larger society. At the same time, the university is aided in handling disciplinary problems by legislation which increases the liabilities imposed upon students for misconduct and is justified in part by the rationale that the university is no longer to be treated as separate and unique. The university benefits both ways, and the student, of course, loses both ways: he is threatened with increased liabilities for misconduct, and at the same time may be denied formal procedural protections.

In light of the recent campus legislation, the courts must break with the tradition of treating the university as a "special enclave." Such a course may well entail applying due process rights to colleges and universities in the same manner as they are applied in other areas of the law and may, in turn, require the courts to grant students more formal and extensive procedural protection. This is only equitable if the legislatures are to increase the liabilities imposed upon students for misconduct. Indeed, in other areas of the law the courts have shown an increasing tendency to require hearings before the government acts against individuals.[85]

The result of requiring more formal and extensive disciplinary proceedings on college campuses may, of course, be the loss of the flexibility and informality that the university often considers so important in carrying out its functions. While this may indeed be a heavy loss, it may also be no more than a belated recognition of the fact that the small closely-knit college community is fast disappearing from American society. Today state-supported universities are often vast and impersonal bureaucracies, at which tens of thousands of students have little or no personal contact with college officials.

84. See text following note 64 *supra*.

85. *E.g.*, Bell v. Burson, 402 U.S. 535 (1971) (hearing required before a driver's license can be suspended); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (hearing required before notices can be posted in liquor stores that a person is not to be sold intoxicating beverages); Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing required before the termination of welfare benefits); Sniadach v. Family Finance Corp., 395 U.S 337 (1969) (hearing required before a person's wages may be garnished); Harris v. United States, 382 U.S. 162 (1965) (hearing required before a person can be punished for criminal contempt in the absence of exceptional circumstances); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970) (hearing required before tenancies in a public housing project may be terminated).

Perhaps in light of the importance of the ideals of informality and flexibility to college communities, the legislation aimed at campus disruptions was ill-advised. That is not now the issue, however, for the legislation exists. Rather the issue is whether in light of such legislation the courts may continue to protect to the same extent the "special characteristics," uniqueness, and independence of the university when they balance the interests of the university against those of the student in determining what is due process in the campus context. To do so would be to ignore a fundamental change, and to expound uneven and inconsistent justice.

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